IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 26.03.2018
CORAM:
THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.Nos.7025 to 7027 of 2018
and WMP Nos.8675 to 8677 of 2018

1. Kalyan Mohan
2. Keerthi Sarayu
Rep. by her father and
Natural Guardian Kalyan Mohan ... Petitioner in all WPs.

vs.

1. The Debts Recovery Appellate Tribunal
at Chennai,
Ethiraj Salai,
Chennai - 600 008
Rep. by its Registrar.

2. Tamilnadu Mercantile Bank,
Rep. by its Authorised Officer,
No.25, Venkatnarayana Road,
T.Nagar, Chennai - 17.

3. Mrs.W.Kasthuri Bai ... Respondents in all WPs

Prayer in WP No.7025 of 2018: WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorari, to call for the records relating to e-auction notice issued by the 2nd respondent dated 16.02.2018 quash the same.

Prayer in WP No.7026 of 2018: WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorari, to call for the records of the 1st respondent dated 03.10.2017 in R.A.S.A.No.90 of 2013 and quash the same.

Prayer in WP No.7027 of 2018: WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of certiorari, to call for the records of the 1st respondent dated 31.08.2017 in I.A.No.1377 of 2017 in R.A.S.A.No.90 of 2013 and quash the same.

For Petitioner in all WPs. : Mr.Niranjan Rajagopalan for M/s.G.R.Associates

For Respondents in all WPs. : Mr.V.Chandrasekaran for R2

COMMON ORDER

(Order of the Court was made by S.MANIKUMAR, J)

W.P. No.7025 of 2018 is filed for a writ of certiorari, to quash the e-auction notice dated 16.02.2018 issued by the Authorised Officer, Tamilnadu Mercantile Bank, Chennai, the 2nd respondent herein.

2. W.P. No.7026 of 2018 is filed for a writ of certiorari, to quash the order dated 03.10.2017 made in R.A.S.A.No.90 of 2013, on the file of the Debts Recovery Appellate Tribunal, Chennai.

3. W.P. No.7027 of 2018 is filed for a writ of certiorari, to quash the order dated 31.08.2017 made in I.A.No.1377 of 2017 in R.A.S.A. No.90 of 2013, on the file of Debts Recovery Appellate Tribunal, Chennai.

4. Perusal of the interim order in IA No.1377 of 2017 in R.A.S.A. No.90 of 2013, dated 31.08.2017 on the file of the Debts Recovery Appellate Tribunal, Chennai, shows that the amount outstanding payable to the bank is Rs.200 Crores.

5. Perusal of the common order made in SARFAESI Application Nos.92, 93 and 98 of 2012, dated 01.07.2013, on the file of Debts Recovery Tribunal-II, Chennai, shows that the tribunal has observed that the applicants therein, who have failed to exercise their right of redemption, cannot question initiation of action under Section 17(1) of the SARFAESI Act, and that they have no locus.

6. Challenging the abovesaid finding and raising other grounds, RA (SA) No.90 of 2013, has been filed by the writ petitioners viz., Kalyan Mohan and Keerthi Sarayu, represented by her father and natural guardian Kalyan Mohan. Alongwith R.A.S.A.No.90 of 2013, writ petitioners have filed IA No.1377 of 2017 for waiver of pre deposit. Vide proceedings dated 31.08.2017, Debts Recovery Appellate Tribunal, Chennai directed the petitioners to deposit a sum of Rs.50 Crores as pre deposit in two equated instalments and further directed the Registry of the Debts Recovery Appellate Tribunal, Chennai to post IA No.1377 of 2017 alongwith RASA No.90 of 2013 on 28.09.2017.

7. Earlier, challenging the interim order in IA No.1377 of 2017, writ petitioners have filed W.P.No.6326 of 2018. During the course of hearing of W.P.No.6326 of 2018, submission was made by the learned counsel for the petitioners therein that subsequently, for non deposit of the said amount, Debts Recovery Appellate Tribunal, Chennai, vide order dated 03.10.2017, dismissed R.A.S.A. No.90 of 2013. Taking note of the same and by observing that interim order passed in I.A.No.1377 of 2017 dated 31.08.2017, has merged with the final order, in R.A.S.A No.90 of 2013 dated 03.10.2017 and nothing survives, in the challenge made to the interim order, vide order dated 21.03.2018, without going into the merits, this Court dismissed W.P.No.6326 of 2018.

8. Inasmuch as there is a finding against the writ petitioners as to the locus on their part to challenge the action of the bank, onceagain the petitioner has chosen to file W.P.No.7027 of 2018, challenging the interim order, which in our view, is not required, as the finding recorded in the interim order dated 31.08.2017 has merged with final order made in IA.No.1377 of 2017 in RA (SA) No.90 of 2013 dated 03.10.2017, on the file of the Debts Recovery Appellate Tribunal.

9. In W.P.No.7026 of 208, the writ petitioners have challenged the final order made in IA.No.1377 of 2017 in RA (SA) No.90 of 2013 dated 03.10.2017, on the file of the Debts Recovery Appellate Tribunal.

10. In W.P.No.7025 of 2018, the writ petitioners have challenged the auction notice dated 16.02.2018, fixing the auction on 28.03.2018.

11. On an earlier occasion when one of the flat owners Indrani Kailash, challenged the interim order in IA No.414 of 2014 dated 28.04.2017, and the consequential final order dated 26.05.2017 made in I.A.No.414 of 2014 in AIR No.927 of 2009 on the file of Debts Recovery Appellate Tribunal, Chennai, upon hearing the learned counsel for the parties, including Tamil Nadu Mercantile Bank, Chennai, the 2nd respondent in the instant writ petitions, we passed the following order on 16.11.2017 in W.P.No.24815 of 2017.

> "6. Mr.V.Chandrasekaran, learned counsel for the Bank/third respondent fairly submitted that Debts Recovery Appellate Tribunal, ought to have considered, as to whether there could be an order of the Debt Recovery Tribunal, fastening liability on the writ petitioner/ninth defendant, to pay the entire loan amount, with interest. We place on record the above submission.

7. Having regard to the above said submissions and considering the material on record, we are of the view that the Appellate Tribunal was not right in exercising its jurisdiction, directing the writ petitioner, one of the flat purchasers, to make pre-deposit for the entire amount, due and payable by all the debtors. Considering the material on record, we are of the view that it is suffice to direct the writ petitioner, to deposit Rs.25 lakhs with the Registrar, Debts Recovery Appellate Tribunal, for entertaining the appeal against the order made in O.A.No.109 of 2007 dated 30/10/2009, on the file of the Debts Recovery Tribunal - II, Chennai.

8. For the reasons stated above, writ petition is allowed and the orders, dated 28/4/2017 and 26/5/2017, made in A.I.R.No.927 of 2009, on the file of the Debt Recovery Appellate Tribunal, Chennai, are set aside. Writ petitioner is permitted to deposit Rs.25 lakhs with the Registrar, Debts Recovery Appellate Tribunal, Chennai, within a period of six weeks, from the date of receipt of the copy of this order. On such deposit and filing memo, Registry of Debts Recovery Appellate Tribunal is directed to process the appeal, and assign regular appeal number. Debt Recovery Appellate Tribunal, Chennai, is directed to dispose of the appeal, within a period of two months, thereafter. No costs. Consequently, the connected Miscellaneous Petition is closed."

12. Petitioners before us are similarly situated. They are also flat owners. Inasmuch as facts are similar, we are of the view that suffice to direct the petitioners to deposit a sum of Rs.25 Lakhs as pre deposit with the Registrar of Debts Recovery Appellate Tribunal, Chennai, for entertaining the appeal filed against final order in RA(SA) No.90 of 2013 dated 03.10.2017 on the file of Debts Recovery Appellate Tribunal, Chennai.

13. Mr.Niranjan Rajagopalan, learned counsel for the petitioners submitted that the said amount of Rs.25 Lakhs would be deposited, with the Registrar of Debts Recovery Appellate Tribunal, Chennai, as pre deposit, for entertaining the appeal against the order dated 01.07.2013, made in S.A.No.92 of 2012 on the file of Debts Recovery Tribunal-II, Chennai, within two weeks.

14. Accordingly, petitioners are directed to deposit Rs.25 Lakhs with the Registrar of Debts Recovery Appellate Tribunal, Chennai, as pre deposit, within a period of two weeks from the date of receipt of a copy of this order and on such deposit, within the abovesaid period, Registrar, Debts Recovery Appellate Tribunal, Chennai, is directed to process the appeal, assign a

regular appeal number and place it before the Debts Recovery Appellate Tribunal, Chennai.

15. With the above directions, W.P.No.7026 of 2018, is partly allowed. No Costs.

16. Challenge to the auction notice dated 16.02.2018, can be made under Section 17 (1) of the SARFAESI Act, 2002, which is an effective and alternative remedy and in this regard, reference can be made to the following decisions.

(i) In Precision Fastenings v. State Bank of Mysore, reported in 2010(2) LW 86, this Court held as follows:

> "This Court has repeatedly held in a number of decisions right from the decision in Division Electronics Ltd. v. Indian Bank (DB) Markandey Katju, C.J., (2005 (3) C.T.C., 513), that the remedy of the aggrieved party as against the notice issued under Section 13(4) of SARFAESI Act is to approach the appropriate Tribunal and the writ petition is not maintainable. The same position has been succinctly stated by the Hon'ble the Supreme Court in Transcore v. Union Of India (2006 (5) C.T.C. 753) in paragraph No. 26 wherein the Supreme Court has held as under: —
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> "The Tribunal under the DRT Act is also the Tribunal under the NPA Act. Under Section 19 of the DRT Act read with Rule 7 of the Debts Recovery Tribunal (Procedure) Rules, 1993 (1993 Rules), the applicant bank or FI has to pay fees for filing such application to DRT under the DRT Act and, similarly, a borrower, aggrieved by an action under Section 13(4) of NPA Act was entitled to prefer an Application to the DRT under Section 17 of NPA." (Emphasis added) "

(ii) In Union Bank of India v. Satyawati Tondon, reported in 2010 (5) LW 193 (SC), the Hon'ble Apex Court, at paragraph Nos.16 to 18 and 27 to 29, held as follows:

> "16. The facts of the present case show that even after receipt of notices under Section 13(2) and (4) and order passed under Section 14 of the SARFAESI Act, respondent Nos. 1 and 2 did not bother to pay the outstanding dues. Only a paltry amount of Rs. 50,000/- was paid by respondent No. 1 on 29.10.2007. She did give an undertaking to pay the balance amount in installments but did not honour her commitment. Therefore, the action taken by the appellant for recovery of its dues by

issuing notices under Section 13(2) and 13(4) and by filing an application under Section 14 cannot be faulted on any legally permissible ground and, in our view, the Division Bench of the High Court committed serious error by entertaining the writ petition of respondent No. 1.

17. There is another reason why the impugned order should be set aside. If respondent No. 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression 'any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

18. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions,

orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for re-dressal of his grievance. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR 1969 SC 556, Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1=1999-2-L.W. 200 and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.

27. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI

Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

28. Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act.

29. In the result, the appeal is allowed and the impugned order is set aside. Since the respondent has not appeared to contest the appeal, the costs are made easy."

(iii) In Saraspathy Sundararaj v. Authorised Officer and Assistant General Manager, State Bank of India, reported in (2010) 5 LW 560, the Court held as follows:

"The petitioner has filed this writ petition praying for a Writ of Certiorarified Mandamus calling for the records relating to the possession notice dated 16.09.2004 issued by the respondent under the SARFAESI Act and consequently direct the respondent to effect the settlement in accordance with the SBI OTS-SME 2010 Scheme as contained in its letter dated 18.03.2010 and unconditionally restore physical possession of the six rooms taken physical possession by it at No. 29, Sarojini Street, T. Nagar, Chennai - 17 with such damages.

... When a specific forum has been created which enables the borrower to challenge the action of the financial institution by filing necessary petition under Section 17, the petitioner is not entitled to invoke the writ jurisdiction of this Court. What could not be achieved by the petitioner by filing a petition before the appropriate Forum, which is at present barred by period of limitation, could not be permitted to be achieved by extending the jurisdiction conferred to this Court under Article 226 of The Constitution of India. Above all, since the petitioner has violated the terms and conditions of the loan by transferring the property in favour of her son, this Court is not inclined to entertain the petition.

.... "

17. In the light of the above discussion, challenge to the auction notice made in W.P.No.7025 of 2018, cannot be entertained and the same is dismissed. No Costs.

18. W.P.No.7027 of 2018, filed against the interim order is dismissed. No Costs. Consequently, the connected Writ Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To
1.The Registrar
The Debts Recovery Appellate Tribunal
at Chennai,
Ethiraj Salai,
Chennai - 600 008

2. The Authorised Officer,
Tamilnadu Mercantile Bank,
No.25, Venkatnarayana Road,
T.Nagar, Chennai - 17.

+3 ccs to Mr.V.Chandrasekaran Advocate sr 23260,23261
23262

W.P.Nos.7025 to 7027 of 2018
and
WMP Nos.8675 to 8677 of 2018

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